

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Time Warner Entertainment– Advance/Newhouse	)	CSR 6412-E
Partnership d/b/a Time Warner Cable	)	CSR 6413-E
	)	CSR 6441-E
Petition for Determination of Effective	)	CSR 6442-E
Competition in Nineteen California Franchise Areas	)	CSR 6443-E
	)	CSR 6446-E
	)	CSR 6447-E
	)	CSR 6449-E
	)	CSR 6477-E

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 30, 2005**

**Released: October 4, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable (“Time Warner”) has filed several petitions with the Commission for determinations of effective competition in nineteen Southern California franchise areas (the “Franchise Areas”)<sup>1</sup> pursuant to Section 623(a) of the Communications Act<sup>2</sup> and the Commission’s implementing rules.<sup>3</sup> Time Warner alleges that

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<sup>1</sup> See (1) Time Warner Canyon Petition (“Canyon Petition”) at 2 (requesting that the Commission find effective competition in Canyon County (CA1354), Stevenson Ranch (CA1552), and North Torrance (CA1557)); (2) Time Warner Cypress Petition (“Cypress Petition”) at 1-2 (requesting that the Commission find effective competition in Cypress (CA1540), Costa Mesa (CA1173), Fountain Valley (CA0752), Garden Grove (CA0943), Los Alamitos (CA0944), City of Orange (CA0940), Rossmoor (CA0845), Stanton (CA0932), and Westminster (CA0750)); (3) Time Warner El Segundo Petition (“El Segundo Petition”) at 1-2 (requesting that the Commission find effective competition in El Segundo (CA0467), Hawthorne (CA1022), Lawndale (CA1099), and Torrance (CA0941)); (4) Time Warner San Clarita Petition (“Santa Clarita Petition”) at 1-2 (requesting that the Commission find effective competition in San Clarita (CA1355)); (5) Time Warner San Marino Petition (“San Marino Peition”) at 1-2 (requesting that the Commission find effective competition in San Marino (CA0992); (6) Time Warner Westminster Petition (“Westminster Petition”) at 2-3 (requesting that the Commission find effective competition in Westminster (CA0750), Huntington Beach (CA0751), Fountain Valley (CA0752), and Stanton (CA0932)).

Certain communities are listed in two Petitions because cable operators are required by Commission rules to file a processing fee for each physical system unit. See Public Notice, *Reminder As To Procedures for Filing Cable Television Effective Competition Petitions*, 20 FCC Rcd 7294, (M.B. April 1, 2005). Time Warner refiled its Petitions to accurately reflect its physical system unit status.

<sup>2</sup>47 U.S.C. § 543(a).

its cable systems serving these Franchise Areas are subject to effective competition and, therefore, are exempt from cable rate regulation. Specifically, Time Warner claims that the effective competition present in these Franchise Areas arises from the competing services provided by two unaffiliated direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar Satellite, L.L.C. As a result, Time Warner asserts that it is subject to effective competition in these franchise areas under the "competing provider" test set forth in Section 623(1)(1)(B) of the Communications Act. The Cities of Garden Grove, Hawthorne, Lawndale and Torrance, the County of Los Angeles, and the Public Cable Television Authority (representing Fountain Valley, Huntington Beach, Stanton and Westminster) have filed oppositions; Time Warner has filed replies.

## II. DISCUSSION

2. Pursuant to Section 623(1) of the Act and Section 76.905 of the Commission's rules,<sup>4</sup> it is presumed that cable systems do not face effective competition absent a demonstration to the contrary.<sup>5</sup> Consequently, the cable operator bears the burden of rebutting the presumption that effective competition does not exist by producing evidence that shows effective competition is present within the relevant franchise areas.<sup>6</sup> Section 623(1) of the Act provides that a cable operator is subject to effective competition if any one of the four tests for effective competition set forth therein is met.<sup>7</sup> A finding of effective competition exempts a cable operator from rate regulation and certain other Commission cable regulations.<sup>8</sup>

3. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), each of which offer comparable programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds fifteen percent of the households in the franchise area.<sup>9</sup> Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.<sup>10</sup> As of June 30, 2005, DirecTV's subscriber growth reached 14.67 million, making it the second largest MVPD provider in the United States,<sup>11</sup> while EchoStar, as the fourth largest MVPD, served 11.46 million customers as of June 30, 2005.<sup>12</sup> Because the two DBS providers have a nationwide footprint and serve well over 20

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(...continued from previous page)

<sup>3</sup>47 C.F.R. § 76.905(b).

<sup>4</sup>See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

<sup>5</sup>47 C.F.R. § 76.906.

<sup>6</sup>See 47 C.F.R. §§ 76.906 & 76.907.

<sup>7</sup>See 47 U.S.C. § 543(1)(1)(A)-(D).

<sup>8</sup>See 47 C.F.R. § 76.905.

<sup>9</sup>47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>10</sup>See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>11</sup> See *The DirecTV Group Announces Second Quarter 2005 Results*, available at <http://www.directv.com> (last accessed on August 15, 2005).

<sup>12</sup>See *Echostar Reports Second Quarter 2005 Financial Results*, available at <http://www.dishnetwork.com> (last accessed on August 15, 2005).

percent of all MVPD subscribers nationwide,<sup>13</sup> we believe these statistics support the presumption that Time Warner's franchise areas are within their satellite footprint. Moreover, Time Warner has provided sufficient evidence of DBS advertising in local, regional, and national media that serves the franchise areas.<sup>14</sup> We conclude that the population of the Franchise Areas may be deemed reasonably aware of the availability of DBS services for the purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the DBS providers' programming satisfies the Commission's program comparability criterion because DirecTV and EchoStar offer more than 12 channels of video programming, including more than one non-broadcast channel.<sup>15</sup>

4. The City of Hawthorne, the City of Torrance, the City of Garden Grove, the City of Lawndale, and the Public Cable Television Authority (the "PCTA") have filed oppositions to Time Warner's petitions. These parties contend that it is impossible to determine if Time Warner's petition meets the first prong of the "competing provider" effective competition test because Time Warner refused their Request for Information ("RFI").<sup>16</sup> They claim that Time Warner's refusal to address the RFI makes it difficult to determine whether comparable programming is offered and whether any regulatory, technical or other impediments exist within the Franchise Areas, especially since 74 percent of Hawthorne's households, 67 percent of Lawndale's households, 44 percent of Torrance's households, 38 percent of the PCTA's households, and 29 percent of Garden Grove's households are occupied by renters.<sup>17</sup> Hawthorne and the PCTA further challenge Time Warner's petition on the grounds that they need time to explore whether renters are denied competitive options due to bulk purchase contracts or physical limitations of satellite antenna placement.<sup>18</sup>

5. We reject the local franchising authorities' ("LFA") arguments for the following reasons. First, we note that there are no Commission procedures in place for LFAs to independently propound RFIs on cable operators claiming effective competition. Accordingly, Time Warner was under no obligation to respond to the RFIs. Moreover, there is substantial evidence on the record to satisfy the first prong of the competing provider test. With regard to programming comparability, Time Warner demonstrated that the programming of DirecTV and EchoStar more than satisfies the Commission's requirements.<sup>19</sup> Nor is the high percentage of renters of import to the instant determination. Rental dwellings constitute households for the purposes of an effective competition determination. In addition, renters are entitled to subscribe to, and install antennas to receive, DBS service in accordance with Section 1.4000 of the Commission's rules.<sup>20</sup> In sum, we find that Time Warner has demonstrated that the Franchise Areas are served by at least two unaffiliated MVPDs, DirecTV and EchoStar, each of which

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<sup>13</sup> See *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 20 FCC Rcd 2755 (2005).

<sup>14</sup> See Petitions at 4-5, n. 12-13.

<sup>15</sup> See 47 C.F.R. § 76.905(g); see also Petitions at 6 (providing DirecTV's and EchoStar's web addresses, linking to channel line-ups that show that the DBS providers offer well over 100 channels, most of which are non-broadcast programs).

<sup>16</sup> See, e.g., Hawthorne Opposition at 2; PCTA Opposition at 4.

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., Hawthorne Opposition at 3; PCTA Opposition at 4-5.

<sup>19</sup> See *supra* n. 15 and accompanying text.

<sup>20</sup> 47 C.F.R. § 1.4000 (Commission's over-the-air reception device rules).

offer comparable video programming to at least 50 percent of the households in the franchise area.<sup>21</sup> Therefore, the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Time Warner's assertion that it is the largest MVPD provider in these Franchise Areas was not disputed by the Franchise Areas.<sup>22</sup>

7. Time Warner has provided a Media Business Corp. Enhanced Satellite Tracking Report showing the number of households in the Franchise Areas.<sup>23</sup> Time Warner also purchased a Satellite Broadcasting and Communications Association Effective Competition Tracking Report for the Franchise Areas reflecting the number of DBS subscribers within the zip codes associated with the cable communities.<sup>24</sup> The data provided by Time Warner indicates that DBS penetration ranges from 15.84 percent in Westminster to 32.88 percent in Stevenson Ranch.

8. According to the County of Los Angeles, Department of Consumer Affairs, Cable and Television Franchise Services (the "County"), Time Warner has failed to rebut the presumption that effective competition does not exist.<sup>25</sup> First, the County asserts that the accuracy of Time Warner's data is erroneous and questionable because the evidence supplied in the Petition and that contained in Time Warner's annual report were inconsistent.<sup>26</sup> Although, Time Warner submitted a revised Exhibit A to its Petition, the County claims the exhibit in the original petition supposedly illustrated the subscriber numbers for three franchise areas, but instead presented figures for the number of homes passed.<sup>27</sup> Secondly, the County argues that Time Warner's methodology of using a five-digit zip code to calculate DBS penetration in each franchise area lacks precision because five-digit zip codes cover broad geographical boundaries that may not be congruent to the franchise areas' boundaries.<sup>28</sup> The County faults Time Warner for not using a nine-digit zip code allocation formula which would produce more narrow results.<sup>29</sup>

9. In Reply, Time Warner asserts that the subscribership data submitted in its Petitions have been clarified to the County and are supported by the evidence. Time Warner further states that it has used a Commission-approved methodology to demonstrate the number of households subscribing to DirecTV and Echostar. It also argues that none of the parties challenged the fact that DBS penetration in the Franchise Areas exceeds the 15 percent threshold.<sup>30</sup>

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<sup>21</sup> See Petitions at 7.

<sup>22</sup> Petitions at 7.

<sup>23</sup> See Exhibit C attached to Time Warner's Petitions.

<sup>24</sup> See Exhibit D attached to Time Warner's Petitions.

<sup>25</sup> Los Angeles County Opposition at 1.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.*; see Los Angeles County Opposition Exhibit 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Time Warner Reply at 2-4.

10. We accept the data, including revised Exhibit A, provided by Time Warner as establishing a reasonable basis for finding that DBS penetration exceeds 15 percent in the Franchise Areas. These penetration rates provide a sufficient margin of error with respect to the 15 percent competing provider test threshold, overcoming any concerns raised by unsupported arguments about DBS penetration imbalances in the subject Franchise Areas. Moreover, the methodology used in calculating DBS penetration has been approved by the Commission in previous cases with similar fact patterns to the ones described by Time Warner here. The Commission supports, but does not at this time require, the submission of effective competition calculations using nine-digit zip code information. We therefore find that Time Warner has provided evidence sufficient to meet the second prong of the competing provider effective competition test.

### III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the Petitions for determinations of effective competition in the California Franchise Areas, as set forth in Attachment A, filed by Time Warner Cable **ARE GRANTED**.

12. The certifications of the nineteen Franchise Areas to regulate basic cable rates **ARE REVOKED**.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker, Deputy Chief, Policy Division  
Media Bureau

## ATTACHMENT A

File No. CSR 6412-E  
 File No. CSR 6413-E  
 File No. CSR 6441-E  
 File No. CSR 6442-E  
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 File No. CSR 6446-E  
 File No. CSR 6447-E  
 File No. CSR 6449-E  
 File No. CSR 6477-E

**FRANCHISE AREAS SERVED BY**  
**Time Warner Cable on behalf of its Affiliates**

**Competing Provider Test**

<b>Franchise Area</b>	<b>2000 Census Household<sup>31</sup></b>	<b>DBS Subs Allocated</b>	<b>CPR: DBS Penetration Rate</b>
Canyon County	9,475	2,592	27.36%
Costa Mesa	39,206	9,976	25.45%
Cypress	15,654	4,123	26.34%
El Segundo	7,060	1,170	16.57%
Fountain Valley	18,162	3,415	18.80%
Garden Grove	45,791	7,785	17.00%
Hawthorne	28,536	5,284	18.52%
Huntington Beach	73,657	14,447	19.61%
Lawndale	9,555	1,881	19.69%
Los Alamitos	4,246	870	20.49%
North Torrance	3,906	677	17.33%
Orange, City Of	40,930	8,195	20.02%
Rossmoor	3,715	761	20.49%
San Marino	4,266	704	16.50%
Santa Clarita	50,787	14,106	27.78%
Stanton	10,767	1,907	17.71%
Stevenson Ranch	4,461	1,467	32.89%
Torrance	54,542	11,056	20.27%
Westminster	26,406	4,183	15.84%

<sup>31</sup> Household Data Figures, available at <http://factfinder.census.gov>; see Petition at Exhibit E.